REPORT AND RECOMMENDATIONS

TO THE

MINISTER OF LABOUR
AND CONSUMER SERVICES

BY THE

ADVISORY COMMITTEE
ON THE STRUCTURES OF THE
WORKERS' COMPENSATION SYSTEM
OF BRITISH COLUMBIA

SUBMITTED ON
OCTOBER 31, 1988

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BARRISTER AND SOLICITOR

October 31, 1988

Honourable Lyall Hanson
Minister of Labour and Consumer Services
Parliament Buildings
Victoria, B.C.
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Dear Mr. Minister:

I have the honour to submit herewith the unanimous report and recommendations of the Advisory Committee on the structures of the workers' compensation system in British Columbia.

Yours very truly

Donald R. Munroe, Q.C.

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INTRODUCTION

The modern system of workers' compensation is often described as the "historic compromise". From the workers' perspective, the right to sue a negligent employer in tort was given up in exchange for a system of no-fault wage indemnity. From the employers' perspective, there was insulation from tort liability in exchange for assuming the cost of the no-fault wage indemnities.

The fundamentals of the system are sound. Rarely in British Columbia does one hear a serious suggestion that the "historic compromise" be set aside; that the old common law be reinstituted in its place. But with increasing frequency, calls for reform within the system are being made by the parties of interest and the public generally.

It is a useful simplification to say that the present-day system of workers' compensation has three component parts: the structures of the system; the law as reflected in the constituent statute; the policies as determined from time to time by the Workers' Compensation Board. Of course, none of the component parts operates in isolation from the others. Inevitably, each part influences or shapes the

evolution of the other two. However, for purposes of study and reform, it is possible to examine the three parts in sequence.

Clearly, the logical starting point is the structures of the system. And on April 15, 1988, the Honourable Lyall Hanson, Minister of Labour and Consumer Affairs, appointed an Advisory Committee with the following terms of reference:

1. The Committee is to examine the current structure of the WCB and provide recommendations to the Minister...as to what needs to be done to ensure that the parties of interest, i.e., employers and workers, can participate effectively in the initiation, development and approval of Workers' Compensation Board policies, programs and procedures. In making its recommendations, the Committee should identify the types of major issues which will benefit from this process and should also consider whether a specific structure should be put in place to carry out the process. However, it is not intended that the Committee should concern itself with the internal administrative processes of the WCB.

2. The Committee is to provide advice on any current issues concerning the workers' compensation system which may be referred to it by the Minister.

The Committee is substantial in size and broadly representative in membership:

Donald R. Munroe, Q.C., Barrister and Solicitor and Chairman of the Committee;

Gordon Cameron, former Vice President of Employee Relations, B.C. Forest Products Ltd.;

Oksana Exell, Director for B.C. and Yukon, Canadian Federation of Independent Business;

Ken Georgetti, President, B.C. Federation of Labour;

Robert Hallbauer, President and Chief Executive Officer, Cominco Ltd.;

Claude Heywood, Assistant Deputy Minister, Ministry of Labour and Consumer Services;

Bernice Kirk, Secretary-Treasurer, Canadian Union of Public Employees, B.C. Region;

James Matkin, President and Chief Executive Officer, Business Council of B.C,;

Jim Nielsen, Chairman, Workers' Compensation Board;

Stan Shewaga, President, Pulp, Paper and Woodworkers of Canada;

Glen Smale, Chief Executive Officer, B.C. Nurses' Union;

David Weller, President, B.C. Construction Association;

Len Werden, President, B.C. and Yukon Territory Building and Construction Trades Council.

THE PROCESS OF DELIBERATIONS

Upon being constituted, the Committee published a Call for Written Submissions in all daily newspapers in the province. It read in part as follows:

> The Minister of Labour and Consumer Services has appointed an independent committee consisting of members from labour, management, government and the WCB and chaired by Donald R. Munroe, Q.C., to provide him with recommendations regarding the structure of the WCB...

> The committee will examine the present structures of the workers' compensation system. It will recommend the changes necessary to ensure the effective operation of the system, and the input of workers and employers in the development of policies, programs and procedures.
>
> The committee will not address individual cases or complaints. Persons and organizations submitting briefs are asked to ensure their submissions are within the committee's mandate.
>
> All written submissions must be received by June 20, 1988 and should be addressed to...

In addition, both before and after the receipt of written submissions, the chairman and other members of the Committee met with a number of individuals and groups, and among themselves, to ensure wide discussion of the issues. We have also considered reports by similar committees in other jurisdictions; the statutes in other jurisdictions; studies by the Ombudsman; studies by private organizations; academic writings. We believe that effective deliberations have been achieved.

The Committee received 45 formal written submissions. As might be expected, some dealt exclusively with subjects within our mandate; some dealt as well (in a few cases largely or even exclusively) with subjects outside our mandate. But those which addressed issues outside our mandate must not be completely ignored on that account. As we commented above, ours must be considered just the first in a sequence of reviews and reforms. Once the new

structures are in place, the other component parts must be examined. We anticipate that the new Board of Governors we are recommending will spearhead the necessary reviews of the law and policies of the system.

Each of the written submissions was carefully examined for the proposals it contained and the force of reasoning with which the proposals were put forward. Beyond that, each submission was examined in light of all others. The point of this latter exercise was to identify areas of apparent consensus within the Committee's mandate. One part of our task is to recommend changes necessary to ensure the input of the parties of interest in the development of the workers' compensation system. That being so, it seemed sensible for the Committee to search out and, where appropriate, be guided by any existing common ground.

A NEW GOVERNING BODY

It is now widely accepted that a new governing body should be constituted by statute to superintend the general direction and policies of the Workers' Compensation Board. The reasons for that view are easy to understand. The Workers' Compensation Board has great powers and obligations, the exercise and discharge of which may profoundly affect individual workers and employers. The

Board is also the immediate guardian of the important social policies reflected in the legislation. It follows that the Board's officers and personnel should have regular input from the parties of interest and the public generally, and should be accountable in the usual ways in the carrying out of their duties.

It should be observed as well that the idea of a governing board is not new. Such boards exist in other Canadian jurisdictions. It is time to introduce it into British Columbia.

The various existing models, and others, have been considered by the Committee. At the threshold is the selection of an appropriate name. While that may seem unimportant, the choice of name does say something about the role contemplated for the governing body. On the one hand, its members should not be involved in the day-to-day minutiae of the organization. Rather, the daily running of the organization should be left to the responsible officers, administrators and other personnel who will be subject to the usual accountabilities. But nor should the new governing body be merely advisory. It should exercise real control in the definition of senior executive functions; the selection and assessment of the most senior officers; the development of policies and regulations; the approval of

operating and capital budgets; the approval of major programs and expenditures; the investment of monies on hand; planning for the future.

The names most commonly proposed for the new governing body are: Council of Advisors; Board of Directors; Board of Governors. In our view, the most apt designation is the last: Board of Governors.

The makeup of the Board of Governors must be addressed. In that connection, the Committee gave consideration to a number of options -- inspired both by existing models and by original submissions. One model would have the Board of Governors comprised solely of persons who are not representative of any particular groups or constituencies. Another model would confine membership to persons representative of labour and management. Yet another model would see government directly represented. Still another model would require that some members have medical, actuarial or other professional qualifications. A final model would acknowledge the predominant position of labour and management, but would argue for the inclusion of a limited number of lay or public interest members.

There can be no question that workers and employers have a rightful claim to a predominant position on the Board of Governors. Workers are the intended beneficiaries of the

system; for the most part, employers pay for it. Little more need be said to legitimize their claim to predominance. In the language of this Committee's terms of reference, workers and employers must be able to "...participate effectively in the initiation, development and approval of [the] policies, programs and procedures" of the workers' compensation system.

One important function of the Workers' Compensation Board is the adjudication of rights between competing parties or interests. In traditional legal terms, the Workers' Compensation Board is often required to act in a quasi-judicial capacity. Thus, while the members of the governing body must necessarily be appointed by the Lieutenant Governor in Council, the government should not itself be directly represented. Perceived as well as actual independence from the executive branch of government has long been a hallmark of our judicial and senior quasi-judicial tribunals.

Nor do we think that professional groups should have places reserved for them on the Board of Governors. Medical or other professional advice can easily be otherwise obtained. Indeed, there is some danger that the existence of "professional governors" would result in the range of professional advice being too narrow.

The proposal of a limited number of lay or public interest governors has more merit. It is true, as we have said, that workers and employers must be accorded the greatest voice on a representative Board of Governors. However, there are good reasons why the general public interest should also be represented. In recent years, there has been a growing public demand -- to which governments are now responding -- for lay or public representation on self-governing bodies established by statute, including those which are self-funded. As an example, three lay persons -- knowledgeable and respected members of the community -- have now been appointed as benchers of the Law Society of British Columbia. No doubt, that analogy is not perfect. But for present purposes, it cannot be distinguished in principle. While the parties with the most immediate interest should hold majority sway, the broad public perspective should have a formal say.

Related to the foregoing is the realization that in both historical and modern terms, the Workers' Compensation Act is an enormously important piece of social legislation. Certainly, the Act is very much concerned with occupational health and safety in individual industrial enterprises, and with claims for compensation by individual workers who have suffered job-related illnesses or injuries. But the Act is

also the embodiment of a social principle in which society as a whole has a stake. For that reason, nobody can truly claim exclusivity of interest.

Our final observations on this point are more pragmatic. First, it is likely that a small representation of carefully chosen lay or public interest governors will be of assistance in the development of consensus among the representative governors. Second, and very frankly, our recommendation as to the makeup of the Board of Governors is a workable balance between the various conflicting viewpoints. It is a genuine attempt to acknowledge the legitimate interests of everyone concerned.

In sum, we think the Board of Governors should be comprised of thirteen voting members.* Five should be representative of workers; five should be representative of employers. Those ten governors should be appointed prior to any of the remaining three being appointed. Their appointments should be in consultation with the recognized organizations of labour and management.

The next step should be the appointment of a chairman in consultation with the ten representative governors.

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*As will be seen, we also think that there should be two non-voting members: the occupants of the newly created offices of president/chief executive officer and chief appeal commissioner.

Lastly, two public interest governors should be appointed in consultation with the earlier-appointed governors including the chairman. (Before leaving the composition of the Board of Governors, we note that a quorum should be defined in terms equally as representative as the board as a whole.)

Of course, all members of the Board of Governors would be appointed by Order in Council. There should be a statutory term of office of not less than four nor more than six years (appointments should be capable of renewal). Some staggering of terms is desirable to ensure continuity.

It is imperative that the governors be drawn from the most senior ranks of their organizations or callings. Adherence to that recommendation will facilitate the development of consensus, just as a lack of adherence will surely hamper such development. Beyond that, senior appointments will be necessary to give this new structure its initial credibility and momentum.

We envisage the Board of Governors being part time. It would meet at prescribed intervals, or more frequently at the call of the chairman. It would have sub-committees which would develop their own meeting schedules.

Some greater attention should be given to the role and office of chairman of the Board of Governors. Our belief

that the Board of Governors should be a part time body includes, for the time being, the chairman. While that could change (indeed, the Committee foresees that it will change), we think that the pool of individuals suitable to be the initial occupant of the office would be unnecessarily limited by a current requirement of a full time commitment. What is required at the outset is someone with diverse talents. First of all, the chairman must enjoy the confidence of the labour and management communities and must be adept at forging consensus. Second, he or she must have the skills necessary to preside at meetings of the Board of Governors; to ensure the productive operation of that body; to facilitate and monitor the implementation of that body's decisions by the subordinate officers and staff. Third, he or she must be capable of acting as public spokesperson on broad policy matters. Finally, the chairman will have to develop the appropriate relationships with government.

From the foregoing, it should be clear that the chairman will require a small staff devoted to the operation of that office.

A NEW SUBORDINATE STRUCTURE

The Board of Governors can be described as being over and in partial substitution for the existing organizational model. In further substitution for that model, we propose

the statutory creation of two new offices. The first is the office of president and chief executive officer. The second is the office of chief appeal commissioner which would include such additional appeal commissioners as may be necessary.

(a) President and chief executive officer

The president/CEO would be appointed by the Board of Governors as its first crucial task. The term of office and other conditions of employment of the president/CEO would be a matter of negotiation and contract between him or her and the Board of Governors. The president/CEO would report and be accountable exclusively to the Board of Governors.

It would be for the Board of Governors to determine the criteria for the selection of the president/CEO, as well as a detailed job description for the position. However, these two observations should be recorded. First, the president/CEO must have a clear commitment to the matters within the jurisdiction of the Workers' Compensation Board, and must possess strong administrative and executive skills. Second, the president/CEO must have no role or involvement in the final adjudication of claims' appeals (about which more will be said below).

In consultation with the Board of Governors, the president/CEO would define the future management structure of the Workers' Compensation Board. He or she would then

make the appointments necessary to put the structure into working practice. This may include the appointment of vice-presidents, directors, managers, senior legal and medical counsel, etc. This structure would oversee all functions of the Workers' Compensation Board except formal claims and other appeals.

As indicated in an earlier footnote, we think it would be beneficial for the president/CEO to be a non-voting member of the Board of Governors. This will facilitate the flow of advice and communications between the executive officers and the Board of Governors.

(b) Chief appeal commissioner

The chief appeal commissioner would also be appointed by the Board of Governors. As with the president/CEO, the conditions of employment would be a matter of contract. To assist in ensuring quasi-judicial independence, there should be a requirement that the contract of employment stipulate a term of office.

The chief appeal commissioner should be selected for his or her ability to fairly judge statutory and factual issues; the skill he or she is likely to bring to the conduct and supervision of quasi-judicial proceedings; generally, the credit he or she will bring to the workers' compensation system.

In this new structure, the chief appeal commissioner would be at a coordinate level in the hierarchy with the president/CEO. Neither would report or be accountable to the other in any respect. Each would have his or her own areas of operation. Both would be accountable directly and exclusively to the Board of Governors. (The nature of the accountability of the chief appeal commissioner will be discussed below.)

As we have intimated, the role of the chief appeal commissioner would be to ensure the proper and expeditious discharge of the Workers' Compensation Board's quasi-judicial duties. Briefly, those duties have to do with claims' appeals, assessment appeals and penalty appeals. Clearly, additional appeal commissioners will be required if cases are to be heard in a fair and timely manner. The precise number of additional appeal commissioners should be left to the Board of Governors in consultation with the chief appeal commissioner. The selection of the individual appeal commissioners should be made by the chief appeal commissioner according to criteria established by the Board of Governors. While the selection criteria should be consistent with those stated above for the position of chief appeal commissioner, the Board of Governors may wish to be more expansive. For example, it may prove desirable to

prescribe the mix between legally trained and non-legally trained appeal commissioners.

In our view, there should be a cadre of full time appeal commissioners (including the chief appeal commissioner) with standard terms of office. However, it should be permissible for the Board of Governors to also authorize the appointment of part time or short term appeal commissioners. We do not envisage this power being exercised routinely. However, from time to time it may prove useful in the control or elimination of appeal backlogs.

The chief appeal commissioner should be empowered to establish panels to adjudicate individual cases. At the discretion of the chief appeal commissioner, a panel would consist of the chief appeal commissioner or another appeal commissioner sitting alone, or any three appeal commissioners (which may include the chief appeal commissioner). The chief appeal commissioner would preside at hearings or meetings of three-member panels of which he or she is a member. The presiding appeal commissioner at hearings or meetings of other three-member panels would be designated by the chief appeal commissioner.

Subject to the general supervision of the Board of Governors, and to the rules of natural justice, the appeal

commissioners would determine their own practice and procedures. That is a power which normally resides in quasi-judicial tribunals. There is no reason to except the appeal commissioners from the norm in that regard.

In common with the president/CEO, the chief appeal commissioner would be a non-voting member of the Board of Governors. By that device, the Board of Governors will be able to ensure that its policies are clearly understood by the system's most senior adjudicators. And in that capacity, the chief appeal commissioner will be a useful resource as to the actual impact of those policies in specific cases.

COMMENTARY ON THE APPEAL STRUCTURE

Most discussions about the appeal structure of the workers' compensation system are centred on claims' appeals. While that leaves the discussion incomplete, it is entirely understandable. Claims for compensation have the greatest consequence to the most number of people coming into contact with the system; for obvious reasons, claims for compensation are also more emotionally charged than practically all other areas of the Workers' Compensation Board's work. Certainly, it is the claims process -- including appeals -- which produces the greatest controversy.

In recent years, there has been considerable debate about whether the final appellate body for disputed claims should be "internal" or "external". While most Canadian jurisdictions have opted for the former, a couple have chosen the latter. For the past approximately 15 years in British Columbia, we have had a mixed system. The initial adjudication of claims is done by claims officers or adjudicators employed by the Workers' Compensation Board. While there are mechanisms for internal reviews by more senior Board personnel, the first formal appeal by either a worker or an employer is to the Workers' Compensation Review Board.

The chairman and other officers of the Review Board are appointed, employed and paid by the Ministry of Labour and Consumer Services -- i.e., not by the Workers' Compensation Board (although the Ministry's expenditures in connection with the Review Board, as approved by the Legislature, are recoverable from the Workers' Compensation Board). In that sense, it is an "external" review tribunal. While its position as an appellate body has lately become legally ambiguous, its function, in simple terms, is to make a finding as to whether the initial adjudication of a disputed claim was correct or incorrect.

The next and final appeal is to a quorum of the present commissioners. Under Sections 79 and 81 of the Workers' Compensation Act, the "...commission...called the Workers' Compensation Board" is continued with not more than five members -- i.e., commissioners -- one of whom is designated chairman. Under Sections 85(2) and (3), the board thus constituted is empowered to make "...the final disposition of an appeal relating to a claim for compensation, a rehabilitation expenditure or assessment, and decisions on the content of regulations..."; and "...decisions relating to procedure, administration and any other matter...." (For some purposes, the board is described as the commissioners or a quorum thereof; for others it is the chairman alone). Within the frame of the "internal vs. external" debate, the commissioners, as the final appellate body, are clearly "internal".

In our view, the argument about whether the final appeal body for disputed claims should be "internal" or "external" has been allowed to be too self-defining -- i.e., to hold out alternatives which are either black or white. The danger of permitting the debate to be defined in terms of opposing extremes is that the ultimate choice may capture the worst as well as the best of the one world. We think the structure we have proposed captures the best and avoids the worst of both worlds.

The argument most frequently made for the creation of a purely "external" tribunal of last resort is that persons exercising quasi-judicial powers must do so with an independent mind. With that proposition we agree completely. And in the context of the workers' compensation system, that can mean two things: independence from the pressures of a governmental agenda; independence from system-generated pressures which may tend to deflect attention from the individual merits of the case under scrutiny.

To avoid both sets of pressures, we have proposed that:

1. A new governing body be established comprised of persons who are either representative of, or agreeable to, the parties of interest;

2. the chief appeal commissioner be selected and appointed by the Board of Governors, not government;

3. the chief appeal commissioner have a contractual term of office;

4. the chief and other appeal commissioners have no duties other than their quasi-judicial duties;

5. the chief appeal commissioner be at a coordinate level in the hierarchy with the president/CEO;

6. the chief appeal commissioner and the president/CEO have no reporting relationship, each being accountable solely to the Board of Governors.

We should add a word about the nature of the chief appeal commissioner's accountability to the Board of Governors. We do not contemplate that the chief appeal commissioner will be accountable for the decisions made in individual cases. On the contrary, the statute should be clear that such is not the case. However, the notion of quasi-judicial independence does not stand as an impediment to an accountability for the general operation of the office. It is crucial to the system as a whole that there be timely disposition of appeal cases. It follows that the Board of Governors, as the body superintending the system, should be kept abreast of developing problems in that regard, and be able to take remedial action.

Related to what we have just said is this further observation. It would make very little sense to craft with such care a new Board of Governors, and then to remove altogether from its ambit the perennially most controversial part of the system's work. We see the new Board of Governors as being key to the future direction and credibility of the system. The process for the final disposition of claims' appeals should not be completely hived off from it. The present "external" Review Board has established a useful niche. As best we can gather, the parties of interest are generally comfortable with it.

Hence, we do not think it should be disturbed.* However, we think there are sound reasons for a modified "internal" body as the last resort.

Our reasoning to this point has concentrated on the advantages of a modified "internal" appeal structure. To complete this comment, we point to the significant disadvantages of a free-floating "external" tribunal. The first has to do with the division of responsibility for policy-making, on the one hand, and adjudication, on the other. Whether one chooses an "internal" or "external" system, it is irrefutable that only one body should be making policy; further, that that body should be the Board of Governors with the advice and assistance of the executive side of the system. From the experience of at least one Canadian jurisdiction, and this strikes us as predictable, the establishment of a purely "external" tribunal of last resort sets up a competition as to where the general policy-making for claims really resides. That is counter-productive both to the work of the system and to its overall credibility.

Our second concern with what we have termed a free-floating, purely "external" tribunal of last resort is that

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* In reaching that conclusion, we have taken note of the effective working relationship which presently exists between the Workers' Compensation Board and the Review Board. We presume and have every reason to believe that that will continue.

over time, it would become too legalistic. Admittedly, that is somewhat impressionistic. However, the collective experience of the Committee is such as to cause it to express this concern with considerable vigour. In the Committee's view, a tendency toward excessive legalism will be checked by the structure we have proposed.

SECTION 96(2) OF THE ACT

It is Section 96(2) of the Workers' Compensation Act which has generated some of the more outspoken criticism of the present structure. That provision states that:

> ...the board may at any time at its discretion reopen, rehear and redetermine any matter which has been dealt with by it, by an officer of the board or by the review board.

At one level, that provision must be regarded as quite innocuous -- even desirable. Indeed, it is both common and necessary for senior administrative tribunals to be given a plenary power of reconsideration. But at another level, Section 96(2) has given rise to serious divisions.

It will be noted that the power of reconsideration which is conferred on the board (in effect, the present commissioners) under Section 96(2) relates not only to matters which have been dealt with by the board itself, but

also to matters which have been dealt with by the Review Board. Section 91 of the Act is the statutory instrument by which a worker or an employer may appeal to the present commissioners against a finding of the Review Board. Section 96(2) is the statutory instrument by which the board may take such an appeal on its own motion.

Some time ago, the Workers' Compensation Board recognized the anxieties which exist in relation to "own motion" appeals. In an effort to allay those anxieties, it published guidelines by which it proposed to govern itself in that connection. In sum, the Board said that it would only lodge "own motion" appeals on six grounds (see Decision No. 403):

1. The finding is on a matter outside the jurisdiction of the Review Board.

2. The finding conflicts with the provisions of the Workers' Compensation Act or is otherwise based on an error of law.

3. The finding conflicts with commissioners' earlier decisions, or a decision of a Medical Review Panel, on the same claim.

4. The finding conflicts with Board policy. Where there is no apparent policy in effect on the issue being considered by the Review Board, it would be expected that the matter would be referred back to the Board for direction and guidance.

5. The finding amounts to an "original decision" rather than a conclusion on appeal.

6. The finding is against the overwhelming weight of the evidence.

The sixth of the above-listed grounds has caused disproportionate controversy and frustration. The Review Board generally conducts full oral hearings. Only rarely do the commissioners hold oral hearings. Understandably, there is skepticism about how the commissioners can weigh the evidence any better -- or even as well -- as the Review Board.

The lack of broad-based confidence in "own motion" appeals could easily be finessed by not permitting them to occur; by saying that an appeal against a finding of the Review Board can be initiated only by the worker or the employer. However, that would assume that serious issues of law and policy are always fully argued at the Review Board level; that claims issues always arise between separate parties who are as likely as not to utilize existing appeal mechanisms.

Those assumptions do not stand up under scrutiny. It is common for one of the parties not to appear at hearings of the Review Board. In the result, important issues can go unargued. As regards the assumption of separate parties with the usual litigious spirit, one need only point to the circumstance of the worker and the employer being the same person.

We do not think that "own motion" appeals from findings of the Review Board are inherently bad. Rather, it is a question of control and structure. The control feature relates to the grounds for appeal and to the identity of the initiating officer. The structure relates to the institutional credibility of the body designated to hear the appeal.

With respect to the grounds for an "own motion" appeal, it is fair to observe that the interests of the system (as well as of the immediate parties) may be at stake where questions of law or policy arise, but that there is no real systemic interest in questions of fact. Thus, there is no clear justification for "own motion" appeals based on alleged factual errors, while justification does exist for "own motion" appeals based on law or policy. We therefore propose that Section 96(2) be amended to limit the grounds for "own motion" appeals against findings of the Review Board to alleged errors of law or published policy.

The initiation of such appeals would be by the president/CEO. We anticipate that a special sub-committee of the Board of Governors would be appointed to monitor both the process of initiation and the ultimate dispositions; generally, the ongoing relationship between the Workers' Compensation Board and the Review Board.

We said above that the structure of the appeal body itself is also important. Without repeating any of the earlier parts of this report, we believe that our proposals concerning the new office of chief appeal commissioner will guarantee the perception as well as the reality of independence.

IMPLEMENTATION OF REVIEW BOARD FINDINGS

We commented above that the position of the Review Board as an appellate body is legally ambiguous. That comment flows from the debate surrounding the recent decision of the Supreme Court of British Columbia in Guadagni vs. Workers' Compensation Board (Vancouver Registry No. A880408), and the pending appeal to the Court of Appeal.

Without reviewing that case in detail, it is apparent that the Workers' Compensation Act requires amendment to more clearly spell out the process of implementation of a finding by the Review Board. The particular circumstance requiring attention is where the Review Board has made a finding that a claim for compensation was wrongly rejected at the initial adjudication.

In that circumstance, periodic payments which would fall due prospectively should commence forthwith. If no

appeal is taken within the time limited therefor, either by a party or pursuant to Section 96(2), retrospective payments, if any, should then be made. Section 91 prescribes a 60-day appeal period. That appears to us to be unduly long. We think that 30 days is adequate, subject to extension for good cause by the chief appeal commissioner. We also think that the prescribed appeal period (subject to extension as aforesaid) should apply not only to party-initiated appeals against findings of the Review Board, but also to appeals against such findings pursuant to Section 96(2).

But suppose that an appeal <u>is</u> lodged against the finding of the Review Board. Where that occurs, retrospective payments should be withheld until completion of the appeal, provided that the disposition of the appeal is published within 90 days of the appeal being initiated. The 90-day period should be capable of extension where: (a) a delay has been at the request of the claimant or, in the opinion of the chief appeal commissioner, has been caused by any act or neglect of the claimant; (b) in the opinion of the chief appeal commissioner, a delay is necessary due to the complexity of the case and not because of any systemic failure or default.

Payments withheld from a claimant, and ultimately determined by a panel of the appeal commissioners to be due

to him or her, and any payments made to a claimant by reason of the expiry of the 90-day period aforesaid (or an extension), should bear interest. The interest should be calculated from and after the 31st day following the publication of the Review Board's finding, but otherwise in a manner prescribed by the Board of Governors. We anticipate that the Board of Governors would adopt a practice similar to that followed under the Court Order Interest Act.

Amounts paid out to workers or dependants should not, in the absence of fraud or misrepresentation, be recoverable.

FUTURE STRUCTURAL REVIEW

Consistent with our terms of reference, the Committee has attempted to identify and to make constructive proposals on the major structural issues now facing the workers' compensation system. We expect that our proposals, if implemented, will have the dual result of effective participation by the interested parties, and proper accountabilities by those running the system. For that reason, we also expect that our proposals, if implemented, will be reasonably durable.

At the same time, it must be appreciated that structural reform is not a one-time affair. The structures of the system must continue to evolve to meet contemporary requirements and expectations.

While we believe that the new Board of Governors will be vigilant in that regard, it is worth emphasizing that structural reform can neither be static nor stand alone. It is conceivable that situations will arise which reveal the need for ad hoc adjustments. In addition, we repeat what we said near the outset: once the new structure is in place, the other component parts of the system must undergo complementary examination.

THE TRANSITION

The change from the current organizational model to the proposed new structure will take a number of months. In that period, transitional or other questions may arise on which the responsible Minister or the Workers' Compensation Board may wish external advice. Against that possibility, and for the period of the transition, the Committee recommends that it remain constituted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Donald R. Munroe, Q.C.

Gordon Cameron

James Matkin

Oksana Exell

Jim Nielsen

Ken Georgetti

Stan Shewaga

Robert Hallbauer

Glen Smale

Claude Heywood

David Weller

Bernice Kirk

Len Werden